
USA PATRIOT Act and Libraries
Ethical Concerns and Policy Implications of Section 215

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They that can give up essential liberty to obtain
a little temporary safety deserve neither liberty nor safety.

Benjamin Franklin

The USA PATRIOT Act and Libraries

The United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, otherwise known as USA PATRIOT (P.L. 107-56), was enacted on October 26, 2001 a mere six weeks after the terrorist attacks of September 11. The act is extensive in its legislative reach. It is not a stand-alone law. Most of its 132 pages make amendments to 15 federal statutes including the Electronic Communications Privacy Act, the Computer Fraud and Abuse Act, the Family Education Rights and Privacy Act, the Foreign Intelligence Surveillance Act as well as federal immigration, wiretap and money laundering laws.¹

The legislation was intended to give law enforcement the ability to respond more quickly to terrorist threats. But the law's sweeping regulations have sparked concern among civil libertarians, free speech and privacy advocates. From the political left to the right, coalitions have formed to look at the legislation and its ramifications. Claiming that the act infringes upon patron privacy and has a chilling effect on free thought and free expression, the American library community has been one of the most vocal in communicating their unease with USA Patriot.

Though there are multiple aspects of the law that effect libraries, the purpose of this paper is to focus on Section 215 which amends the Foreign Intelligence Security Act (FISA) and expands the definition of business records to include patron's library records. Furthermore, the law changes the standard of proof required to receive a court order and imposes a "gag" rule which prohibits librarians from revealing to anyone (the patron or outside parties) what records were subpoenaed. And, though librarians have found themselves in an ethical standoff, with their professional ethics seemingly at odds with the purpose and intent of the act, this paper posits that librarians' will find their most effective response to USA Patriot by following their own professional code of ethics and creating very specific records retention policies.

Methodology

The primary sources of research for this paper were Section 215 of the act itself as well as multiple interviews conducted with the primary stakeholders affected by the law. The following were interviewed:

- **Academic Librarians**
 - Associate Director for Public Services, University of Michigan, Ann Arbor Library
 - Director, University of Michigan, Ann Arbor Law Library
 - Director, University of Michigan, Dearborn Library
 - Associate University Librarian, Cal State Hayward
- **Public Librarians**
 - Director, Ann Arbor District Library
 - Director, Dearborn Public Library
- **University Attorney**
 - Assistant General Counsel, University of Michigan, Ann Arbor
- **American Library Association (ALA)**
 - Past President, ALA
 - Associate Director, ALA Office for Intellectual Freedom
 - Associate Director, Office of Government Relations

- **ACLU-Michigan**
Legal Director, ACLU Michigan
- **Federal Bureau of Investigation**
FBI Press Officer, Washington DC
- **Patrons/Citizens**
2 library patrons

For secondary sources, I first did a literature search for articles on the USA Patriot Act and libraries. Second, I looked at privacy and records retention policies at libraries across the country.

Legal Issues: Section 215 of the Patriot Act

Multiple parts of the USA Patriot Act affect libraries. Sections 214 and 216 of the Act extend the FBI's telephone monitoring authority to include Internet and electronic communications. Section 206 permits the use of "roving wiretaps" which allows the investigating agency to obtain a court order to monitor the electronic communications of a single person at any location or on any device (including email and Internet activity). But Section 215 has gotten the most attention in the library community because of its direct application to library records.

Business Records

Before USA Patriot, it was certainly possible for a library to have records subpoenaed under a court order. But after the enactment, specifically Section 215, the jurisdiction of what could be authorized under FISA was broadened to include library records. Previously, FISA authorized collection of only certain categories of business records, such as rental car, hotel lodging, and commercial storage records. Now, the term business record is broadly defined and can include any business record including health, library and education records. As a consequence, law enforcement agencies can make an application to the FISA court for an order requiring the production of "any tangible thing" (including circulation records, Internet usage records, computer hard drives, books or tape backups). This application can be for any investigation to "protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution."²

Burden of Proof

Furthermore, since records can now be subpoenaed under a FISA "secret" court instead of a criminal court the burden of proof is different. Under criminal law, probable cause must be shown and the evidence sought must be pertinent to an actual crime committed. Under the Patriot Act that FISA court order need only prove that the information be "a significant purpose" of the investigation rather than "the purpose."³ In addition, because many of these orders are search warrants, it is more difficult to appeal the order. And because a federal "secret" court issues the court order it is somewhat impractical to know how it would even be challenged. As one ALA representative commented, "The only court of jurisdiction is a secret court in Washington, DC. If you get served an order in Oregon you would have to hire an attorney in Oregon and an attorney in DC. And it isn't even clear that the FISA court would hear the appeal since, currently, only government employees can testify before the court."⁴

Gag Rule

Section 215 also imposes a "gag" rule on the person served a warrant.⁵ As a result, neither the library nor librarian can disclose, under penalty of law, the existence of the warrant or the fact that records were

produced as the result of a warrant. A librarian can seek legal counsel, but cannot notify the patron or any outside parties.

Ethical Issues

The main reason the library community has been so vocal in its opposition to USA Patriot is due to the clash between the values behind the legislation and the values behind the librarian's own code of conduct. On the one side is the law enforcement community which claims that libraries are logical targets for surveillance since some of the September 11 bombers used library computers to communicate. Furthermore, the FBI's utmost professional responsibility is to ensure the safety of the country and thwart any future terrorist attacks. As an FBI press officer stated, "Library patrons should have a reasonable expectation of privacy, but that privacy interest is outweighed if the FBI can show a patron's relevance in an ongoing terrorist investigation."⁶

On the other side is the library profession. This is a profession that fundamentally believes and is committed to concepts of intellectual freedom, privacy and the freedom to access information. As the ALA resolution in opposition of the Patriot Act states, "Libraries are a critical force for promoting the free flow and unimpeded distribution of knowledge and information for individuals, institutions, and communities."⁷ The feeling in much of the library community is that Patriot violates these basic ethical principles.

Professional Code of Ethics

The following principles from the Code of Ethics of the American Library Association⁸ are illustrative of the ethical conflict presented by USA Patriot.

- *Principle Two: We uphold the principles of intellectual freedom and resist all efforts to censor library resources.*
As Principle Two states, one of the tenets of a democratic society is intellectual freedom: the freedom of thought and the freedom to read. The concern is that USA Patriot and laws like it will have a chilling effect on thought since they increase the likelihood that the government will monitor reading habits and Internet searching patterns of patrons without their knowledge or consent. Consequently, there is the concern that someone will self-censor on how they use the library. As one librarian said, "It is ludicrous to assume that what someone reads will tell you what they are going to do. If that person takes the information that they read and commits a crime, then there are laws to deal with that. But just because you read something doesn't mean you are going to do something."⁹
- *Principle Three: We protect each library user's right to privacy and confidentiality with respect to information sought or received and resources consulted, borrowed, acquired or transmitted.*
Currently, 48 states have laws protecting the confidentiality of library records. Though this federal legislation trumps the state laws, the belief among the library community is that patron's library records are private and confidential. As we have seen, the act lowers the burden of proof for maintaining a warrant. Furthermore, there is a gag order with reference to telling anyone that the library has been subpoenaed. The secrecy of the warrant and the lessened burden of proof give librarian's pause since they believe a lack of privacy in the library can lead to self-censorship.

Catch 22

Librarians, like many Americans, are expressing that they have been placed in a sort of Catch 22. On the one hand, librarians have a responsibility to be good citizens and to not impede a legitimate investigation. On the other hand, they have the professional responsibility to protect a patron's privacy and

confidentiality. Unfortunately, some in society see this as a black and white issue – you are either with us or against us. As a result, librarians are put in a position that if they disagree with USA Patriot or with the investigation then they are viewed as being unpatriotic. But as one librarian pointed out, “The purpose of a library is to connect people to information, not to monitor the information they use.”

Lack of Transparency

Another ethical problem facing librarians is the secretive nature of the law. First, the “gag” order surrounding the law makes it impossible for librarians to reveal if they have been served a warrant. Second, it has been very difficult to have oversight of the law because the FBI has been unwilling to release information, even in an aggregate form, on the number of warrants that have been served. This puts privacy, civil liberty and library groups in a challenging situation because they can’t get any sense if the law is being used properly or if it is being abused. Finally, because a “secret” FISA court issues the warrants it is very difficult to contest the subpoena.

Stakeholders

There are multiple stakeholders affected by this legislation. In my research I interviewed people from each sector.

- **Library Directors** – First, library directors hold ultimate responsibility for record retention and privacy policies. Second, they are responsible for training library staff on patron privacy and confidentiality issues. Third, they have a responsibility to work with outside vendors to ensure that patron privacy is protected in these external databases and services. Finally, they must work with the community in which they are located to make sure that community members understand their privacy rights.
- **Librarians/Library Staff** – Librarians and library staff may be served with a search warrant under USA Patriot and should understand their rights and responsibilities under the law. Further, this constituency should understand their own library’s policies on record retention and privacy.
- **Citizens as library patrons** – Library patrons may have their circulation and Internet records subpoenaed under a Patriot Act court order, or may fear that their reading and/or searching behavior will be looked at by the government.
- **Citizens as concerned about national security** – The USA Patriot Act’s intention was to allow law enforcement to react more quickly to threats of terrorism.
- **Library legal counsel** – Library directors should contact their legal counsel when they are served a warrant or subpoena under Patriot.
- **Law enforcement/FBI** – Law enforcement’s professional responsibility is to guarantee the safety of citizens, to find and thwart any terrorist activities and to “use all weapons within the law to enhance the security of this country.”¹⁰
- **Policymakers** – Policymakers are under pressure from multiple constituencies to both guarantee the safety of citizens while at the same time not creating laws that infringe upon civil liberties. Furthermore, policymakers are responsible for providing oversight for the Act to ensure that the FBI’s powers have not gone too far.

- **Interest Groups** – Civil liberty and privacy groups are trying to raise awareness about the law and its potential ramifications to civil liberty. They are also concerned about making sure that the government does not abuse the powers it has under the law.

Ethical Principles & Recommendations: Minimize Harm

Libraries play a vital role in a democratic society. In order to maintain that importance, I would argue that the key ethical principle that should guide librarians in the face of USA Patriot and other legislation like it is the concept of minimizing harm. The library community must endeavor to minimize the harm of Patriot by turning to their own professional practice and ethical guidelines and enacting principles of fair information practice. While it is important to work through advocacy groups and professional organizations to try to have the law amended or appealed, in the day-to-day activities of the library the greatest way to protect privacy and intellectual freedom is to ensure that (1) record retention policies and privacy policies are in place and are followed; (2) the library does not create additional forms of protest that could chill free thought; and (3) all staff are trained in the library's policies and procedures.

Record Retention & Privacy Policies

By far the best way a librarian can protect patron privacy is to either not collect or to quickly and permanently destroy personally identifiable information. Though the decision to request records is made by the justice system, librarians have the discretion to determine what records are created and maintained in the first place. As one librarian told me, "Maybe the one silver lining of Patriot is that it is forcing librarians to look at their record retention and privacy policies and make sure that they are appropriate and are being enforced. The fewer records kept, the less information that is vulnerable to subpoena." If the library makes sure that it follows fair information practices and collects only the minimum amount of information and then destroys that information when it no longer serves a business purpose, patron privacy will be more protected in the library than in many other locations, even if information is subpoenaed.

Throughout my research librarians seemed very confident about the record retention policies of circulation or paper records, but seemed less clear about how electronic (Internet and database usage) records were stored and maintained. And as one ALA representative pointed out, "It is even harder to know what the policies of outside vendors are. It isn't always clear what information those companies are keeping and what they are doing with that information."¹¹ It is important here that libraries do an inventory to identify all documents that might track a patron's computer activity or database searching history. Furthermore, librarians must work with their vendors to ensure that patron data is protected.

Finally, librarians should be cautious of the mission creep that affects all data collection processes. There is an interest in the library community, like most businesses, to use patron data as a way to improve management, marketing and budgeting. It is important to remove personally identifiable information when this type of data is collected so as to not put patron privacy in jeopardy.

Don't Do More to Chill Free Thought

Libraries across the country, including the Santa Cruz public library, have started posting "warning" signs to alert library patrons of the Patriot Act and its potential impact on their privacy. The Santa Cruz sign states,

Warning: although Santa Cruz public library makes every effort to protect your privacy, under the federal USA Patriot Act records of books you obtain from this library may be obtained by federal agents. Questions about this policy should be directed to Attorney General John Ashcroft.

Although this may be a form of protest or even a form of warning and education it does not minimize the harm of the Patriot Act. It instead adds another way to chill the thought and inquiry of patrons. As one librarian told me, “If you really want to keep people away from your library then you would post these signs.”¹² Community education and outreach is important. However, a knee-jerk reaction is what got us the Patriot Act in the first place. It is now time to be thoughtful and deliberative about our reaction to terrorism and to the government’s increasing interest in citizen information. Building awareness of Patriot is key, building fear may not be.

Training

As one library director told me, “It is our ethical responsibility to make sure we have policies in place regarding what to do in case a warrant is served and to make sure that our staff understand what to do.”¹³ The USA Patriot has caused considerable concern in the library community, with stories floating around that the FBI is going to bust in the doors in the middle of the night when the freshman undergrad is working the circulation desk. Although it is possible, it most likely isn’t probable. As someone told me, “These guys work 9 to 5, just like the rest of us do.”¹⁴ Regardless, the role of the librarian, especially the library director, is to ensure that all staff members are trained and understand the procedures in case a search warrant or subpoena is presented.

Furthermore, the library community must commit to train all staff and volunteers on the importance of privacy and record retention. As one librarian commented, “Our problem isn’t only that law enforcement is looking at patron information. We have a problem with staff looking into patrons’ reading and searching habits if those people seem ‘suspicious’.”¹⁵ Here, it is important to rely on the librarian code of ethics. Though legitimate suspicious behavior should be reported, the library staff must not report on patrons just because they fit a certain racial profile.

In Conclusion: Practice Deliberation

Librarians are and should be concerned about the USA Patriot Act. Librarians, through experience, understand that as we start to collect information for one reason we experience a type of mission creep and we end up collecting information for other reasons. But I would also caution that now is the time to practice deliberation and to be thoughtful about how to ensure that library patrons are not unnecessarily harmed by the legislation. Though the law is poorly drafted and over-reaching, it is the librarian’s professional duty to minimize the harm of this legislation by following the ethical principles and practices of the profession. Posting warning signs, instilling fears of midnight break-ins, or even initiating surveillance does not minimize harm. Librarians have the power to ensure a reasonable amount of privacy by only collecting and maintaining information that is absolutely necessary for the operation of the library. Reacting on fear and suspicion got us the Patriot Act; let’s not keep perpetuating the problem.

¹ P.L. 107-56

² P.L. 107-56 §215 amends Title V of the Foreign Intelligence Surveillance Act of 1978 to change the definition of a business record. It now reads,

“SEC. 501. ACCESS TO CERTAIN BUSINESS RECORDS FOR FOREIGN INTELLIGENCE AND INTERNATIONAL TERRORISM INVESTIGATIONS.

(a)(1) The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an

investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.”

³ P.L. 107-56 §218

⁴ Personal Interview

⁵ P.L. 107-56 §215 amends Title V of the Foreign Intelligence Surveillance Act of 1978 to state:

“(d) No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section.

⁶ Personal Interview

⁷ American Library Association Resolution On The USA Patriot Act and Related Measures That Infringe On The Rights of Library Users

⁸ Code of Ethics of the American Library Association (revised 1995). Available at http://www.ala.org/Content/NavigationMenu/Our_Association/Offices/Intellectual_Freedom3/Statements_and_Policies/Code_of_Ethics/Code_of_Ethics.htm

⁹ Personal Interview

¹⁰ ibid

¹¹ ibid

¹² ibid

¹³ ibid

¹⁴ ibid

¹⁵ ibid